82-1450

No.

In the Supreme Court of the United States

October Term, 1982

IN RE: MILTON PHILIP SCHULMAN,
Petitioner.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTION PRESENTED FOR REVIEW

In a proceeding to discipline an attorney, may disciplinary action be taken against the attorney, even though he has been exonerated of the only charge levied against him?

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on November 30, 1982.

CITATION TO OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Ohio, Eastern Division, is unreported as of this date. The opinion is set forth in the Appendix at page A33.

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported as of this date. The opinion is set forth in the Appendix at page A1.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1254.

CONSTITUTION INVOLVED

Amendment V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF FACTS

This is a disciplinary proceeding initiated by the Honorable Robert B. Krupansky, who was a judge of the United States District Court for the Northern District of Ohio at the time this action arose.[1] Milton P. Schulman ("Schulman"), the Petitioner herein, is an attorney and a member of the bar of the United States District Court for the Northern District of Ohio.

The allegations against Schulman arose out of pretrial proceedings and the trial in *Ford v. Kinzel*, Civil No. C78-769 (N.D. Ohio), a civil rights housing discrimination suit. Schulman represented the defendants in *Ford v. Kinzel*.

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1. Judge Krupansky is now a member of the U.S. Court of Appeals for the Sixth Circuit. He has been represented throughout this proceeding by Solomon Oliver, Assistant U.S. Attorney, 1404 East Ninth Street, Suite 500, Cleveland, Ohio 44114.

It was charged that Schulman "knowingly and willfully pursued a course of conduct both prior to and throughout the trial of [*Ford v. Kinzel*] designed and calculated to disrupt the orderly resolution of this litigation . . ." Following the charge, twenty specifications of allegedly disruptive conduct were presented, not as acts of misconduct in and of themselves, but rather as specifications of the manner in which the alleged plan of disruption was implemented.

On December 20, 1978, Judge Krupansky conducted a show cause hearing to consider the allegedly unethical trial conduct by Schulman. Following this hearing, Judge Krupansky ordered that Schulman be stricken from the roll of attorneys authorized to practice before the United States Court for the Northern District of Ohio. He also imposed extensive conditions for Schulman's readmission.

Schulman appealed Judge Krupansky's decision to the United States Court of Appeals for the Sixth Circuit. That court reversed the decision and remanded the case for a new hearing before a different judge, who would have no personal involvement in the controversy. On remand, the case was assigned to the Honorable Leroy J. Contie, Jr.[2] Judge Contie conducted a hearing and elicited testimony from several witnesses. On February 12, 1981, Judge Contie issued an order permitting Schulman's name to remain on the roll of attorneys allowed to practice in the United States District Court for the Northern District of Ohio only if he met certain conditions and complied with certain restrictions. Schulman appealed that judgment to the U.S. Court of Appeals for the Sixth Circuit.

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2. Judge Contie is now a member of the United States Court of Appeals for the Sixth Circuit.

The Court of Appeals rendered its decision on November 30, 1982. The majority opinion (of Judges Keith and Jones) exonerated Schulman of the charge against him:

> "We do not think that Schulman knowingly and willfully pursued a course of conduct designed and calculated to disrupt the orderly resolution of the litigation in *Ford v. Kinzel.*" (Appendix page A3).

The majority, however, *affirmed* Judge Contie's disciplinary order, offering only the following explanation for that decision:

> "Nevertheless we agree that Schulman's conduct went far beyond an honest good faith effort to present his client's case." (Appendix page A3).

The remaining member of the panel, the Honorable Walter E. Hoffman (sitting by designation) filed a lengthy and vigorous dissent. Insofar as is relevant to this Petition for a Writ of Certiorari, Judge Hoffman argued that the majority could not discipline Schulman for acts not charged in the specifications, nor could it discipline Schulman at all, since it had exonerated him from the only charge against him.

From the decision of the United States Court of Appeals for the Sixth Circuit, Schulman seeks *certiorari* from this Court.

REASONS FOR GRANTING THE WRIT

Disciplinary proceedings "are adversary proceedings of a quasi-criminal nature." *In re Ruffalo,* 390 U.S. 544, 551 (1967). Although designed to protect the public they are also "a punishment or penalty imposed on the lawyer." *Ex parte Garland,* 71 U.S. (4 Wall.) 333, 380 (1866). Therefore, the attorney is "accordingly entitled to procedural due process, which includes fair notice of the charge" in such specifics and at such a time as to permit meaningful preparation of a response. *In re Ruffalo,* 390 U.S. at 350; Cf. *In re Gault,* 387 U.S. 1, 33 (1966). Indeed, any action seeking to discipline a lawyer ". . . must proceed according to the most exacting demands of due process of law." *Willner v. Committee on Character and Fitness,* 373 U.S. at 106 (1963). See also: *In re Ruffalo, supra.*

The charge states that Schulman "knowingly and willfully pursued a course of conduct . . . designed and calculated to disrupt the orderly resolution of this litigation." The majority, quoting the charge, absolved the Petitioner by stating: "We do not think Schulman knowingly and willfully pursued a course of conduct designed and calculated to disrupt the orderly resolution of the litigation in *Ford v. Kinzel,*" but then the majority affirmed, saying "[n]evertheless, we agree that petitioner's conduct went far beyond an honest good faith effort to present his client's case."

In comparing the language of the charge with the language of the majority's order, it is clear that the majority dismissed the charge entirely, and, in effect, *recharged* Petitioner with "bad faith."

It is not possible to ascertain from the majority opinion what conduct of the Petitioner constituted "bad faith." Nor was Petitioner ever called upon to defend against

a charge of "bad faith". Indeed, the term "bad faith" is wholly foreign to the Canons of Ethics of attorneys.

Thus, the Petitioner, having been exonerated of the only charge against him, is being punished upon a charge *never* made against him, a charge which is *incomprehensible*, a charge which does not allege a violation of any ethical canon.

If the decision of the United States Court of Appeals for the Sixth Circuit is permitted to remain undisturbed by this Court, it stands for the following propositions:

1. An attorney may be disciplined on the basis of a charge never made against him and which he was never called upon to defend.

2. An attorney may be punished in a disciplinary proceeding even though he has been exonerated of the only charge against him.

3. Where an attorney has successfully defended against a disciplinary proceeding by establishing his innocence of the charge against him, he may nevertheless be subjected to discipline based on other charges which were never made against him.

4. An attorney may be disciplined solely for his "bad faith" during the trial of litigation, without any further articulation of the precise conduct which is alleged to constitute "bad faith".

5. An attorney may be disciplined for conduct which does not violate any ethical canon, if a court determines that he has acted in "bad faith".

The simple recitation of the grounds of the decision which Petitioner seeks review is, we believe, sufficient to establish the importance of this Court's intervention in this proceeding.

CONCLUSION

For the foregoing reasons, we pray the Court to issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit and to review and decide this case.

RELIEF ULTIMATELY SOUGHT

Petitioner believes that this Court should rule that the Petitioner has been exonerated from the only charge made against him and that the decisions of the Court of Appeals and the District Court in this case must, therefore, be reversed, with instructions to dismiss the disciplinary proceeding.

Respectfully submitted,

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APPENDIX

OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed November 30, 1982)

No. 81-3158

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN THE MATTER OF: DISBARMENT OF MILTON PHILIP SCHULMAN,
Respondent-Appellant.

BEFORE: KEITH and JONES, *Circuit Judges* and HOFFMAN*.

ORDER

This is a disciplinary proceeding initiated by the Honorable Robert B. Krupansky, who was a judge of the United States District Court for the Northern District of Ohio at the time this action arose. Judge Krupansky issued an order temporarily suspending Milton P. Schulman ("Schulman"), the respondent-appellant, from the practice of law in the United States District Court for the Northern District of Ohio for at least two years. The allegations against Schulman arose out of pre-trial proceedings and the trial in *Ford v. Kinzel*, Civil No. C. 78-769 (N.D. Ohio), a civil rights housing discrimination suit. Schulman represented the defendants in *Ford v. Kinzel*.

*Hon. Walter E. Hoffman, Senior District Judge, Eastern District of Virginia, sitting by designation.

Ford v. Kinzel was tried before a jury. On December 20, 1978, Judge Krupansky conducted a show cause hearing to consider 20 acts of allegedly unethical trial conduct by Schulman. Following this hearing, Judge Krupansky ordered that Schulman be stricken from the roll of attorneys authorized to practice before the United States District Court for the Northern District of Ohio. He also imposed extensive conditions for Schulman's readmission.

Schulman appealed Judge Krupansky's decision to this Court. This Court reversed that decision and remanded the case for a new hearing before a different judge. On remand, the case was assigned to the Honorable Leroy J. Contie, Jr. Judge Contie conducted a suspension hearing and elicited testimony from several witnesses. He also examined the transcript of the trial in *Ford v. Kinzel.* On February 12, 1981, Judge Contie issued an order permitting Schulman's name to remain on the roll of attorneys allowed to practice in the United States District Court for the Northern District of Ohio only if he met certain conditions and complied with certain restrictions. Schulman perfected this appeal.

On appeal, Schulman argues that Rule 2.09 of the Local Civil Rules for the Northern District of Ohio is unconstitutionally vague and does not comport with the minimum requirements of due process. We disagree. Local Civil Rule 2.09 governs the disciplining of attorneys in the United States District Court for the Northern District of Ohio. Rule 2.09 provides in pertinent part:

> Any member of the Bar of this Court may, for good cause shown and after having been given an opportunity to be heard, be disbarred, suspended from practice for a definite time, reprimanded, or subjected to such other discipline as the Court may deem proper.

Judge Contie held that Rule 2.09 did not violate due process. We agree.

Schulman also argues that the evidence did not warrant the restrictions and conditions placed upon his ability to remain a member of the bar of the United States District Court for the Northern District of Ohio. We disagree. We do not think that Schulman knowingly and willfully pursued a course of conduct designed and calculated to disrupt the orderly resolution of the litigation in *Ford v. Kinzel.* Nevertheless, we agree that Schulman's conduct went far beyond an honest good faith effort to present his client's case. *In re McConnell,* 370 U.S. 230 (1962).

Accordingly, we affirm Judge Contie's order placing restrictions and conditions upon Schulman's ability to remain a member of the bar of the Northern District of Ohio with one minor modification. Judge Contie held that Schulman could not appear without co-counsel in any matter before the United States District Court for the Northern District of Ohio. This restriction was based in large part upon Schulman's hearing impediment. A corrective device, however, may correct Schulman's problem. To the extent that Schulman can prove that a hearing device will correct his hearing impediment, we vacate that part of Judge Contie's order which requires the appearance of co-counsel.

IT IS SO ORDERED.

Entered by Order of the Court

/s/ JOHN P. HEHMAN
Clerk

HOFFMAN, *District Judge*, concurring in part and dissenting in part.

In this disciplinary action the United States District Court for the Northern District of Ohio, through the United States Attorney for the Northern District of Ohio, has charged that petitioner "knowingly and willfully pursued a course of conduct both prior to and throughout the trial of [*Ford v. Kinzel*] designed and calculated to disrupt the orderly resolution of this litigation. . ." Following the charge, twenty specifications of allegedly disruptive conduct are presented not as acts of misconduct in and of themselves, but rather as specifications of the manner in which the alleged plan of disruption was implemented.[1]

Pursuant to this charge and on remand from this Court,[2] Judge Contie, after concluding that the District Court for the Northern District of Ohio, under Local Civil Rule 2.09, had the power to regulate members of the legal profession admitted to practice before it and that petitioner's right to substantive and procedural due process had not been contravened, found that the petitioner

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1. Judge Contie notes the following in his District Court opinion: "Twenty specific acts of misconduct have been noticed in support of the United States Attorney's general charge that respondent intentionally pursued a course of conduct designed and calculated to disrupt the orderly resolution of the cause of action commenced in *Ford v. Kinzel.*" *In The Matter of: Milton Philip Schulman,* No. 79-1117A (N.D. of Ohio, Feb. 12, 1981).

2. Initially, the trial judge in *Ford v. Kinzel* charged Schulman of misconduct, found him guilty and had Schulman's name stricken from the roll of attorneys authorized to practice before the United States District Court for the Northern District of Ohio. On appeal, this Court vacated the order of the trial judge and remanded the case to the District Court to be heard by a different judge giving two reasons for its conclusion. First, there was no apparent urgency requiring the show cause hearing to be conducted upon the short notice given petitioner. Second, the Court concluded that the matter should have been referred to another judge because of the "marked personal feelings on both sides."

intentionally pursued the following patterns of misconduct throughout the *Ford* trial, which were *designed* and *calculated* to disrupt the orderly resolution of the case: (1) behavior demeaning to witnesses and prejudicial to the jury, (2) disrespectful remarks to the judge and refusal to comply with proper courtroom procedures and orders, and (3) delay of the trial proceedings. Based upon the specific acts of misconduct . . . the Court hereby finds that respondent violated Disciplinary Rule 7-106(C) of the ABA Code of Professional Responsibility.[3] (Emphasis added)

From this order petitioner appeals on two grounds. First, that Rule 2.09 of the Local Civil Rules for the Northern

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3. Disciplinary Rule 7-106(C) which Judge Contie prescribes as "the minimum standard of professional conduct for courtroom appearances" follows:

> In appearing in his professional capacity before a tribunal, a lawyer shall not:
>
> (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.
>
> (2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.
>
> . . . .
>
> (4) Assert his personal opinion as to the justness of a cause, as to the credibility, of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.
>
> (5) Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply.
>
> (6) Engage in undignified or discourteous conduct which is degrading to a tribunal.
>
> (7) Intentionally or habitually violate any established rule of procedure or of evidence.

District of Ohio is unconstitutionally vague and does not comport with the substantive component of the Due Process Clause. Second, petitioner argues the evidence presented does not establish by clear and convincing evidence that he engaged in unethical conduct motivated by fraud, deceit, or dishonesty.

In response to petitioner's first contention regarding the constitutionality of Rule 2.09, the majority affirms with no explanation. In response to his second contention the majority simply states:

> We do not think that Schulman knowingly and willfully pursued a course of conduct designed and calculated to disrupt the orderly resolution of the litigation in *Ford v. Kinzel*. Nevertheless, we agree that Schulman's conduct went far beyond an honest good faith effort to present his client's case. *In re McConnell*, 370 U.S. 230 (1962).

I

In regard to the first issue, I agree with the majority that Local Rule 2.09, as adopted by the majority of the district judges in the Northern District of Ohio, is not unconstitutionally vague where it refers to disbarment, suspension from practice for a definite time, a reprimand, or subjection to such other discipline as the Court may deem proper "for good cause shown". The American Bar Association Code of Professional Responsibility is the recognized standard of ethics of the profession and respondent apparently took an oath to this effect when he was admitted to the bar of the District Court. It would be impossible to draft local rules specifying every particular act or omission of an attorney relating to disciplinary actions.

I also agree with the District Court when it states that the federal court has inherent authority to admit at-

torneys to practice before it and thus has the power to bring disciplinary actions against those attorneys who are guilty of unethical conduct. *Ex parte Wall*, 107 U.S. (17 Otto.) 265, 273 (1882); *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 512 (1873); *In re Echeles*, 430 F.2d 347, 349 (7th Cir. 1970). However, I feel that if an attorney is not as good as he should be then the more appropriate action is to report the attorney's conduct to the Bar Groups so that they can make the determination of what disciplinary action is appropriate. After all, although a disbarment or other disciplinary action in the federal court is not binding on the courts of the State of Ohio, *Theard v. United States*, 354 U.S. 278 (1957), it can be highly persuasive. By reporting the matter to the Bar Groups for screening we provide a more neutral approach so as to prevent any potential element of prejudice or vindictiveness.

II

In regard to the second issue, I have further difficulty with the majority's response. Specifically, I question the majority's authority, procedurally, to absolve the petitioner of the charge but nevertheless find him guilty based on the determination that his conduct "went far beyond an honest good faith effort." I also disagree with the majority's conclusion that petitioner's conduct was in fact in bad faith or to use the majority's language, "went far beyond an honest good faith effort."

A. *Has the Majority, in Effect, Acquitted the Petitioner When They Absolve Him of the Charge that He Carried Out a "Plan" to Disrupt the Trial?*

Disciplinary proceedings "are adversary proceedings of a quasi-criminal nature." *In re Ruffalo*, 390 U.S. 544, 551 (1967). Although designed to protect the public they

are also "a punishment or penalty imposed on the lawyer." *Ex parte Garland,* 71 U.S. (4 Wall.) 333, 380 (1866). Therefore, the attorney is "accordingly entitled to procedural due process, which includes fair notice of the charge" in such specifics and at such a time as to permit meaningful preparation of a response. *In re Ruffalo,* 390 U.S. at 350; Cf. *In re Gault,* 387 U.S. 1, 33 (1966).

The charge states that Schulman "knowingly and willfully pursued a course of conduct. . . designed and calculated to disrupt the orderly resolution of this litigation." The majority, quoting the charge, now absolve the petitioner by stating: "We do not think Schulman knowingly and willfully pursued a course of conduct designed and calculated to disrupt the orderly resolution of the litigation in *Ford v. Kinzel,*" but then the majority affirms saying "[n]evertheless, we agree that petitioner's conduct went far beyond an honest good faith effort to present his client's case."

In comparing the language of the charge with the language of the majority's order it appears that the majority has dismissed the charge entirely, and, in effect, recharged petitioner with bad faith. Although the majority cites no authority for this proposition I assume they adopt some type of lesser included offense theory. However, the problem created by the decision is that I am not sure what conduct by Mr. Schulman the majority has relied on or what in fact constitutes "far beyond an honest good faith effort." I can only state with confidence that the language the majority uses derives from the following statement in *McConnell*:

> While we appreciate the necessity for a judge to have the power to protect himself from actual obstruction in the courtroom, or even from conduct so near to the court as actually to obstruct justice, it is essential to

> a fair administration of justice that lawyers be able to make honest good-faith efforts to present their clients' cases.

In re McConnell, 370 U.S. at 236.

Thus, I question whether the petitioner has had an opportunity to defend against a finding of his acting "far beyond an honest good faith effort" based on a charge that he "knowingly and willfully pursued a course of conduct designed and calculated to disrupt the orderly resolution of the trial." The charge states very specifically what petitioner is charged with and I feel that an acquittal of this specific charge should absolve petitioner completely.

B. *Is Petitioner Guilty of "Bad Faith"?*

Although I question the authority of the majority in affirming the District Court's order in the manner discussed above, I am confident, based on the specific language of the charge, that I cannot affirm without at least a finding of bad faith. As set forth above, the Supreme Court has stated in *In re Ruffalo, supra*, that procedural due process requires fair notice of the charge in such specifics and at such time as to permit meaningful preparation of a response. An examination of the charge reveals no allegation of inadequacy or incompetence, and, in fact, petitioner admits in his brief that he was "inept in his manner of presentation" and "insufficiently efficient, too slow, and not sharp." However, petitioner defends on the ground that he was not guilty of any plan or scheme to disrupt the trial, or with any act of "deceit or dishonesty."

If we assume for the moment that the majority's action in finding petitioner guilty of bad faith is proper procedurally, the question becomes is petitioner guilty of bad faith based on his conduct in *Ford v. Kinzel*. A find-

ing of mere negligence or incompetence would be insufficient.

At this point, with the issue properly framed, it would be well to note that the suspension of an attorney can destroy "his professional life, his character, and his livelihood." *In re Fisher*, 179 F.2d 361 (7th Cir. 1950). Therefore, we must view "an attorney's license to practice as a 'right' which cannot lightly or capriciously be taken from him." *Kivitz v. SEC*, 475 F.2d 956, 962 (App. D.C. 1973). After all, "the power [to withdraw that right] . . . is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court, as the rights and dignity of the court itself." *Ex parte Secombe*, 60 U.S. (19 How.) 9 (1856). The Supreme Court has admonished that the power "ought always to be exercised with great caution; and ought never to be exercised except in clear cases of misconduct, which affect the standing and character of the party as an attorney." *Ex parte Wall*, 107 U.S. (17 Otto.) at 273. Consequently, in disciplinary proceedings the District Court must find that "the charge must be sustained by clear and convincing proof." *In re Fisher*, 179 F.2d at 369. On appeal we must determine if "there was an abuse of discretion or grave irregularity" by the District Court in applying the standard of "clear and convincing proof" since the evidentiary hearing before the District Court included the live testimony of seven witnesses. *In re Spicer*, 126 F.2d 288, 289 (6th Cir. 1942). *See Ex parte Burr*, 22 U.S. (9 Wheat.) 529, 530-31 (1824).

The majority, without discussing the standard of review they apply, simply cite *In re McConnell, supra*, in

support of their finding that petitioner's "conduct went far beyond an honest good faith effort to present his client's case." However, the majority does not specify any of the circumstances surrounding petitioner's actions, or, in fact, indicate what conduct went "far beyond an honest good faith effort."[4] Moreover, *In re McConnell,* on which the majority relies, involved a summary contempt proceeding (in my view an appreciably less drastic proceeding than a suspension or disbarment case) in which the Seventh Circuit's affirmation of the District Court's conclusion that the attorney was guilty was reversed by the Supreme Court.

McConnell, a lawyer, was summarily found guilty of contempt of court for statements made while representing the Parmelee Transportation Company. On appeal, in *Parmelee Transportation Company v. Keeshin,* 294 F.2d 310 (7th Cir. 1961), the Seventh Circuit affirmed the District Court's decision based on certain specifications; however, Judge Duffy dissenting in part at 317 said: "The attorneys for the plaintiff were driven to a sense of frustration due to the District Court's rulings on offers of proof. Under such circumstances, it is understandable that an attorney might say things which should not have been said. I think that was the situation in the case at bar." On appeal, the Supreme Court, with Justice Black writing for the majority, expressly agreed with Judge Duffy, *In re McConnell,* 370 U.S. at 235, and further said: "We cannot agree that a mere statement by a lawyer of his intention to press his legal contention until the court has a bailiff stop him can amount to an obstruction of justice that can

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4. I assume it may be presumed that the majority simply adopted Judge Contie's able opinion regarding his analysis of Schulman's conduct in the *Ford v. Kinzel* trial. However, to fully understand the circumstances and actions of Schulman in *Ford v. Kinzel* requires an examination of the record from Schulman's perspective.

be punished under the limited powers of summary contempt which Congress has granted to the federal courts." The Court went on to state:

> The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty. The petitioner created no such obstacle here.
>
> While we appreciate the necessity for a judge to have the power to protect himself from actual obstruction in the courtroom, or even from conduct so near to the court as actually to obstruct justice, it is also essential to a fair administration of justice that lawyers be able to make honest good-faith efforts to present their clients' cases. An independent judiciary and a vigorous, independent bar are both indispensable parts of our system of justice. To preserve the kinds of trial that our system envisages, Congress has limited the summary contempt power vested in courts to the least possible power adequate to prevent actual obstruction of justice, and we think that that power did not extend to this case.

In re McConnell, 370 U.S. at 236.

Although the Supreme Court apparently felt that the contempt conviction by the Seventh Circuit in *McConnell* primarily rested on one particular statement made by McConnell, I believe the rationale of Judge Duffy's dissent in *Parmelee Transportation,* which was expressly adopted by the Supreme Court in *McConnell,* can and should be extended to the situation at hand. While petitioner was not altogether blameless in his conduct in the *Ford v. Kinzel* trial, since he evidently was unfamiliar with the Federal

Rules of Evidence which became effective in 1975, he nevertheless was confronted with rulings, both evidentiary and otherwise, throughout the trial, which would be frustrating to any attorney.[5] For example:

(1) The trial judge persisted, on approximately 7 occasions, in applying the old rule of law that an attorney cannot impeach his own witness. Rule 607, F.R.Evid., is to the contrary stating that "the credibility of a witness may be attacked by any party, including the party calling him."[6]

(2) The trial judge applied the rule that, until a witness is shown to be hostile, the witness cannot be subjected to leading questions. Rule 611(c), F.R.Evid., provides, "a witness identified with an adverse party" may be subjected to "leading questions". This is especially pertinent as to the witness, Gelzer, the supervisor of the Cuyahoga Plan which was a group formed to assist blacks in their efforts to assist persons in possible litigation under the Fair Housing Act. Gelzer was clearly a person identified with the plaintiff, Mrs. Ford, who was an adverse party as petitioner was representing the defendant.

(3) The trial judge insisted that only a "custodian" of the records could be permitted to testify as to the office records, apparently maintained in the

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5. However, I am confident that had Schulman cited the relevant evidentiary rules to the trial court, the trial judge would have altered his rulings. The record, however, discloses very little opportunity afforded to petitioner to argue such matters.

6. "The traditional rule against impeaching one's own witness is abandoned as based on false premises. A party does not hold out his witnesses as worthy of belief, since he rarely has a free choice in selecting them. Denial of the right leaves the party at the mercy of the witness and the adversary." Adv. Comm. Note to Fed.R.Evid. 607.

regular course of business, of the Cuyahoga Plan and, since Gelzer was only a supervisor who answered to his "boss", the judge ruled that Gelzer did not qualify as a "custodian." Rule 803(6), F.R.Evid., provides for the testimony of a "custodian or other qualified witness. Since Gelzer's "boss" resided some distance away, Gelzer should have been considered an "other qualified witness."

(4) The trial judge *sua sponte*, objected to petitioner's questions by insisting that no proper foundation had been laid.[7] The rule with respect to laying a proper foundation is, insofar as this case is concerned, dependent upon relevancy. If the relevancy is based upon a condition of fact not already established by prior evidence, the court may probe the issue of relevancy, or may admit the evidence as "conditionally relevant" subject to a later ruling.[8] In some few instances the trial

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7. The reporter noted in the record as a matter of procedure not only objections by plaintiff's attorney but also occasions when the plaintiff's attorney merely stood but remained silent due to the trial judge sustaining any objection before the attorney had a chance to speak. In light of this procedure, the record indicates a *sua sponte* objection by the trial judge without plaintiff's attorney even standing approximately 100 times. The judge on these occasions specifically cites improper foundation as the reason approximately 21 times. The majority of the remaining *sua sponte* objections, although the trial judge often gave no reason for the objection, I believe also relate to improper foundation or objection as to form. I note that on many occasions in the *Ford v. Kinzel* trial plaintiff's attorney merely stood up without uttering a word and the trial judge sustained the objection on the grounds of "no proper foundation" or "improper form."

8. The Advisory Committee's Note on Rule 104(b), F.R.Evid., as reported in Redden & Saltzburg, Federal Rules of Evidence Manual, states: "If preliminary questions of conditional relevancy were determined solely by the judge, as provided in subdivision (a), the functioning of the jury as a trier of fact would

(Continued on following page)

judge in *Ford v. Kinzel* was clearly correct, as where petitioner made inquiry as to the marital status of a witness. In the vast majority of his rulings, however, the relevancy of the question was either (a) not explored by the court, (b) not based upon a condition of fact, or (c) the fact had otherwise been established by prior evidence. When confronted by petitioner's inquiry as to what the court wanted by way of a foundation, the trial judge merely advised petitioner that "this is your job" and not that of the court.

On one occasion during cross examination of the plaintiff, petitioner attempted to attack plaintiff's credibility. The trial judge, without exploring the possibility, directed petitioner to go on to something else. Petitioner persisted in this line of questioning since he was apparently convinced that plaintiff had committed perjury. When the judge again repeated "I have ruled that this line of questioning is improper," the petitioner responded: "How do you know." At this point the trial judge directed petitioner to sit down. Eventually, petitioner was allowed to have the material portions of the deposition of plaintiff read into evidence.

Footnote continued—

be greatly restricted and in some cases virtually destroyed. These are appropriate questions for juries. Accepted treatment, as provided in the rule, is consistent with that given fact questions generally. The judge makes a preliminary determination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition. If so, the item is admitted. If after all the evidence on the issue is in, pro and con, the jury could reasonably conclude that fulfillment of the condition is not established, the issue is for them. If the evidence is not such as to allow a finding, the judge withdraws the matter from their consideration."

(5) The trial judge prohibited counsel from stating, in the presence of the jury, anything other than the fact that an objection was noted. Generally, the judge allowed counsel to approach the bench to submit his reasons for the objection, or any offer of proof if the objection was by the judge or opposing counsel. On at least 8 occasions, the judge refused to let petitioner approach the bench to explain his reasons. Rule 103(a)(2) F.R.Evid., accords counsel an absolute right to make an offer of proof as to excluded evidence *unless* the testimony sought to be offered "was apparent from the context within which questions were asked." On at least two occasions, this was not so.

(6) In many instances petitioner's "misconduct" stemmed from the deviation by petitioner from the strict rules of decorum promulgated by the trial judge for his own court, and not under Rule 83, F.R.Civ.P., which requires that local rules be adopted by a majority of the judges within a district.[9] For example, certain specifications reveal that petitioner was charged with

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9. I realize that the last sentence of Rule 83 provides: "In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules." The Advisory Committee Note indicates that this sentence is taken from the United States Supreme Court Admiralty Rule 44. But the question remains whether a single district judge in a district court with multiple judges may invoke "standing orders" applicable to cases in general, as contrasted with a single case. In my judgment the issue is debatable but, in this particular case, it is not, in my opinion, necessary to decide the question. While the single judge rules are extensive, they do not provide for disciplinary proceedings in the event of violation. At best, the Courtroom Procedure Order entered by the trial judge, without the majority of the district judges joining in said order, on September 24, 1976, is merely a guide to the courtroom procedure which the trial judge reasonably expects to be followed in the preparation and trial of all cases before him.

a. unnecessary and noisy activity at counsel table;

b. roaming about the courtroom; and

c. standing at counsel table;

In addition, Schulman was repeatedly admonished for violating other rules of decorum such as leaving the lecturn during the interrogation of witnesses and, as stated earlier, for proffering his reasons for objections without first obtaining permission from the Court.[10]

(7) Petitioner was fined for contempt on three occasions.

In the first instance Schulman was cross-examining an adverse witness inquiring whether counsel for the plaintiff had told witnesses what to say. The witness answered "No; we were told to tell the truth." In response to this answer Schulman stated "Naturally you're told to tell the truth." Thereupon the trial judge found petitioner in contempt and fined him $250.

In the second instance, petitioner attempted to ask plaintiff's landlord whether plaintiff had a yearly lease or a month-to-month lease at the time of the alleged discrimination. The trial judge sustained an objection three times (*sua sponte* on the last occasion) before implying to petitioner that he understood where petitioner was heading with his line of inquiry but that "the testimony thus far elicited is improper unless you lay a proper foundation. . . I'm not precluding you

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10. I realize that the alleged violations of these rules are set forth to support the charge that petitioner "knowingly, and willfully pursued a course of conduct designed and calculated to disrupt the orderly resolution of the litigation."

from the examination." After the court objected two more times, *sua sponte*, petitioner inquired what would be a proper foundation. The court responded (out of the jury's presence) "If you're so inexperienced that you don't know. . . [t]hen you shouldn't be practicing here." Thereupon the court prevented, again *sua sponte*, petitioner's attempts to lay a proper foundation on three more occasions before petitioner asked, in front of the jury, "I'm going to ask for a mistrial." At this point the trial judge, after dismissing the jury, asked petitioner if there was any reason why the court should not hold him in contempt for his "very unprofessional conduct," and his "highly prejudicial remark." Petitioner attempted to answer but the trial judge again found him in contempt of court and assessed a fine this time for $500.

On the third and final instance, petitioner was questioning the defendant as to whether she had reached a decision regarding a certain potential tenant in the event the house was available. In attempting to answer the question the defendant attempted to give background information on which she apparently based her decision. The court stopped the witness and directed her "not to go away from the question." (The defendant had already been admonished at least three times for rambling.) When the witness started to answer the question in the same manner, the court again interrupted and asked "did you, yes or no, ma'am?" The witness responded "I'm trying to tell you." Petitioner then requested the court's permission to approach the bench and after getting permission petitioner apparently stated in a loud voice, "she has answered the question, your Honor."

The Court admonished petitioner about making such outbursts in the presence of the jury. Petitioner twice denied making any such "outbursts". (The record merely indicated the petitioner's comment was at the bench and thus "outside the presence of the jury.") After further dialogue (apparently loud enough for the jury to hear) regarding whether petitioner should be held in contempt the court recessed the jury and admonished petitioner at length regarding his prejudicial conduct and failure to respect the court's rulings.[11] The court then found petitioner in contempt and fined him an additional $500.[12]

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11. Specifically, the court admonished petitioner as follows:

"Mr. Schulman, because of your outbursts in front of the jury again, I have been required to dismiss the jury. . . . Your conduct, as I said before, is reprehensible. You are making prejudicial statements in the presence of this jury. Your theatrics, your expressions, everything that you do is designed to create a prejudice. You are constantly provoking witnesses and the Court.

As I have tried to explain to you on many occasions, Mr. Schulman, when the court rules, your exceptions are noted. In the event that my rulings are improper or incorrect, you have a right to appeal whatever the decision in this case may be. But your conduct and your actions and the improper ruling of this court is not excuse for that conduct.

Now, the Court has listened to the question, the Court has ruled that this lady's response has been concluded, that she would not be permitted to go beyond the answer given. You insist upon taking issue with the Court after the ruling; your client insists upon insisting on answering when the Court has ruled.

I understand the reaction of your client. Since I am confident that she has not had experience in testifying, her conduct is excusable. Your conduct is inexcusable."

12. The three summary contempt actions are not before the court at this time as the actions of the trial court were affirmed by a prior panel of this Court, at which time the disbarment action by the trial court was remanded to be considered by another

(Continued on following page)

In addition, without trying to specify and weigh all of the actions of the trial judge versus the petitioner's, it is impossible to deny, after reading the entire record, that there was fault on each side with both the trial judge and the petitioner demonstrating ill will towards one another and hot tempers.[13] I wholeheartedly agree with the reasoning in the order by a prior panel of this court when it reversed the trial judge's disbarment order after the *Ford v. Kinzel* trial remanding the case back to the Northern District of Ohio to be heard by a different judge due to the fact that "marked personal feelings were present on both sides, and it appear[ed] that Schulman's conduct left personal stings, however justified."

Under these circumstances and based on the reasoning of Judge Duffy's dissent in *Parmelee Transportation,*

Footnote continued—

judge. However, as to the summary contempt actions, the previous panel did not discuss any of the details of the alleged offenses. As to the three instances where petitioner was fined for contempt I only point them out as examples of the circumstances present in the *Ford v. Kinzel* trial.

13. Both the trial judge and Schulman are guilty of directing insulting remarks at one another on occasion. For example, in connection with the defendant's inability to testify for the first time due to nerves Mr. Schulman explained, "a doctor will not help her. I know her condition; if you want me to explain it to you, I'll explain it to you," In response the trial judge stated, in front of Mr. Schulman's client, "I didn't know that you were a physician, Mr. Schulman, among your other talents."

In another instance out of the hearing of the jury and just prior to the second contempt citation the trial judge, in admonishing Schulman to lay a proper foundation stated, "I'm not going to tell you how to try your case. If you're so inexperienced that you don't know . . . [t]hen you shouldn't be practicing here."

On a third occasion, subsequent to the above two instances, the court admonished Schulman during voir dire examination of a witness by Schulman to "stop roaming around and please return to the lecturn! You would think after three days, you'd know what the procedure is." In response Schulman stated: "I have a comment for it, but I'll keep it."

supra, which was adopted by the Supreme Court in *McConnell*, I cannot agree with the majority's determination that petitioner was acting in bad faith. Instead, what we have is the majority in effect simply punishing petitioner for not being a good lawyer,[14] for not adhering to the strict rules of decorum promulgated by the trial judge for his own court,[15] and for being too persistent. After examining petitioner's conduct in relation to that of the trial judge I conclude that we are not confronted with any act of fraud or dishonesty or with any act of bad faith, but rather we have a case involving courtroom procedure which obviously offended the trial judge in *Ford v. Kinzel* but which may have been of no significance with another judge.

The most grievous offense petitioner committed in my opinion was petitioner's continuing argument on motions and rulings after express orders by the trial judge to cease. While I am aware of the Supreme Court's instruction in *Sacher v. United States*, 343 U. S. 1, 9 (1951), which says that "if [a] ruling is adverse, it is not counsel's right to resist it or insult the judge—his right is only respect-

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14. It is interesting to note that the effect of the District Court order as modified by the majority's order is to suspend petitioner until he achieves a proficiency in and understanding of the Federal Rules of Civil Procedure, Criminal Procedure, Evidence, Local Civil Rules for the Northern District of Ohio and the ABA Code of Professional Responsibility. In addition, petitioner must attend six trials (3 jury) and subscribe to an oath that he will conduct himself in a manner commensurate with the ABA Code of Professional Responsibility.

15. Indeed, many of the specifications which support the charge that petitioner willfully pursued a course of conduct calculated and designed to disrupt the trial represent pettiness. For example: petitioner failed to mark and exchange proposed exhibits; petitioner failed to sequentially index all exhibits intended to be used at trial; petitioner stood at counsel table; and petitioner shuffled papers, books, and documents. The indexing was apparently required by pretrial rules and should have been handled prior to the actual trial.

fully to preserve his point for appeal," I note that the Court also states in *Sacher* that "of course, it is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable, to obtain the court's considered ruling. Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts." *Sacher, id.* at 9. The Seventh Circuit elaborates further in *In re Dellinger,* 461 F.2d 389, 399 (7th Cir. 1972), after first discussing the *Sacher* case, by stating that

> When the judge is arbitrary or affords counsel inadequate opportunity to argue his position, counsel must be given substantial leeway in pressing his contention, for it is through such colloquy that the judge may recognize his mistake and prevent error from infecting the record. It is, after all, the full intellectual exchange of ideas and positions that best facilitates the resolution of disputes. However, this is not to say that attorneys may press their positions beyond the court's insistent direction to desist. On the contrary, the necessity for orderly administration of justice compels the view that the judge must have the power to set limits on argument. We simply encourage judges to exercise tolerance in determining those limits and to distinguish carefully between hesitating, begrudging obedience and open defiance.

Because of the trial judge's rulings where he prevented petitioner from approaching the bench to submit his position regarding objections and where the trial judge objected to petitioner's inquiries *sua sponte* on the grounds of relevancy without exploring the issue, I believe that petitioner's conduct throughout the trial is at least partially excusable since it should be characterized as "begrudging obedience" rather than "open defiance." On the occasion

that petitioner perhaps went too far, the appropriate remedy was summary contempt.

I admit that petitioner was inadequate in his manner in presentation but he has not been charged with this offense. Rather, he has been accused of planning or scheming to disrupt the orderly resolution of the trial. As discussed *supra*, when the majority found petitioner not guilty of any plan or scheme but nevertheless stated that his conduct went "far beyond an honest good faith effort," I question whether petitioner has in effect been acquitted. However, even if the majority is allowed to bend the charge so as to allow an affirmation of the District Court's sentence with a slight modification based on a finding of bad faith, I am confident that the charge should not and cannot be altered any further. Consequently, based on this charge, I cannot affirm since it is my opinion that what we have in *Ford v. Kinzel* is simply poor lawyering by Schulman but conducted in good faith in the defense of his client's case.

III

I note that the District Court, in finding petitioner guilty, stated that

> the overriding issue [of disciplinary proceedings] "is the public interest and the attorney's right to continue to practice a profession imbued with public trust." *In re Echeles, supra* at 350.

Although I agree that public interest is a crucial issue in any disciplinary proceeding which must be balanced with the attorney's right to practice his profession. I believe that in this proceeding the overriding issue is whether petitioner's right to procedural due process, which includes fair notice of the charge, has been violated.

Nevertheless, if we assume that public interest must be protected in this instance and that petitioner should be disciplined for his conduct in *Ford v. Kinzel*,[16] whether it involves bad faith or not, we are still left with the difficult question of how much punishment is appropriate.[17]

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16. Public interest in a professional and ethical bar is not the only interest at stake in disciplinary proceedings since sanctions can amount to loss of livelihood and professional reputation. *See Erdman v. Stevens*, 458 F.2d 1205, 1209-10 (2nd Cir. 1972). *In re Ming*, 469 F.2d 1352, 1355 (7th Cir. 1972).

17. If we conclude, as I did, that petitioner's conduct does not involve bad faith and we assume that there is no violation of petitioner's right to procedural due process, the question becomes should an attorney be suspended or disbarred for mere inadequacy in representing his client's case? To me, this is a more difficult question to answer especially in light of the fact that petitioner, in effect, won his case in *Ford v. Kinzel* where the jury, although finding in favor of the plaintiff, only awarded compensatory damages of $1 and punitive damages of $374. I note that most reported cases of disciplinary actions against attorneys involve either an act of dishonesty or the failure to perform an obligation undertaken on behalf of a client. *See e.g.*, Annot. *Attorney-Negligence-Discipline*, 96 A.L.R.2d 823 (1964). Indeed, an analysis of *In re Echeles, supra*, reveals that the language on which the District Court relies for the public interest argument is dictum in that case, with the Seventh Circuit in *Echeles* relying on another Seventh Circuit case, *In re Fisher, supra*, and the Supreme Court's decision, *Ex parte Wall*, 107 U.S. (17 Otto.) at 273. Further analysis reveals that in *In re Fisher* 179 F.2d at 369, the Seventh Circuit also required that the charges be "sustained by clear and convincing proof and the misconduct must have been fraudulent and the result of improper motives." In *Ex parte Wall, supra*, the disbarment proceeding was premised upon an unlawful hanging with the Supreme Court concluding that such "unlawful acts . . . showing such an utter disregard and contempt for the law constitute sufficient grounds to strike the name of an attorney from the rolls so as to protect the court from . . . persons unfit to practice as attorneys therein."

The Supreme Court also stated that

> It is laid down in all the books in which the subject is treated, that a court has power to exercise a summary jurisdiction over its attorneys to compel them to act honestly towards their clients, and to punish them by fine and imprisonment for misconduct and contempts, and, in gross cases of misconduct, to strike their names from the roll. If regularly convicted of a felony, an attorney will

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In addressing this issue I turn for guidance to the various disciplinary proceedings arising out of the Communist trial of *United States v. Foster, aff'd. sub nom. United States v. Dennis,* 183 F.2d 201 (2nd Cir. 1950), *aff'd. Dennis v. United States,* 341 U.S. 494 (1951).

In *Dennis,* five lawyers, including Isserman, were adjudged guilty of contempt for their conduct while representing several defendants.[18] After the contempt convictions were affirmed in *Sacher v. United States,* 343 U.S. 1 (1951), the Bar Association for the City of New York instituted disciplinary proceedings against Isserman in the United States District Court for the Southern District of New York with Judge Hincks finding that Isserman should be suspended from that district for a period of two years. Isserman filed a notice of appeal, but did not pursue it because the New York City Bar instituted a new proceeding for disbarment before the Southern District of New York pursuant to Rule 5(b)(2).[19] This disciplinary proceeding was precipitated by the fact that the Supreme Court of New Jersey had entered an order of disbarment against Isserman due to his conduct in *Dennis,* and apparently because Isserman had been convicted of statutory rape

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Footnote continued—

> be struck off the roll as of course, whatever the felony may be, because he is rendered infamous. If convicted of a misdemeanor which imports fraud or dishonesty, the same course will be taken. He will also be struck off the roll for gross malpractice or dishonesty in his profession, or for conduct gravely affecting his professional character.

Ex parte Wall, 107 U.S. (17 Otto.) 265, 273 (1882).

18. Judge Hand described the conduct as including "persistent obstructive colloquies, objections, arguments, and many groundless charges against the court . . . of judicial misconduct." *United States v. Sacher,* 182 F.2d 416 (2nd Cir. 1950).

19. Rule 5(b)(2) of the Southern District of New York provided for the disbarment of any attorney who had been disbarred in any other court.

twenty-seven years before.[20] *In re Isserman,* 9 N.J. 269, 87 A.2d 903 (1952). In this second proceeding before the Southern District of New York, Chief Judge Knox, after noting that Isserman had been disbarred previously by New Jersey because of a statutory offense, filed a memorandum for disbarment. However, he delayed entering the order pending the Supreme Court's decision in *Sacher v. Association of the Bar of the City of New York,* 347 U.S. 388 (1954).

Meanwhile, based on the New Jersey disbarment, the United States Supreme Court, in accordance with Rule 2, directed Isserman to show cause why he should not also be disbarred from practice in that Court.[21] After hearing the case, the Court concluded, in an unusual four to four split, that an order disbarring Isserman from practice should issue since the attorney failed to meet his burden. The dissent, however, written by Mr. Justice Jackson and

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20. The United States Supreme Court noted the following:

> 'The Supreme Court of New Jersey, in its nine-page opinion, devoted one sentence to noting that respondent had been convicted of statutory rape in 1925 and thereupon suspended from practice for a short period. That one sentence is followed by this language: "The controlling consideration in reaching a determination as to the measure of discipline, however, is respondent's scandalous and inexcusable behaviour in seeking to bring the administration of justice into disrepute in a trial that lasted nine months."

In re Isserman, 345 U.S. 286, 290 (1952).

21. Rule 2 par. 5 of the Supreme Court stated:

> Where it is shown to the court that any member of its bar has been disbarred from practice in any State, Territory, District, or Insular Possession, or has been guilty of conduct unbecoming a member of the bar of this court, he will be forthwith suspended from practice before this court, and unless, upon notice mailed to him at the address shown in the clerk's records and to the clerk of the highest court of the State, Territory, District or Insular Possession, to which he belongs, he shows good cause to the contrary within forty days he will be disbarred.

joined by Justice Black, Frankfurter and Douglas, concluded as follows:

> Primarily because of these contempts, the Supreme Court of New Jersey disbarred Isserman. It also considered his conviction in that State of statutory rape in 1925. At the time of conviction, however, the New Jersey courts found such extenuating circumstances that only a small fine and a temporary suspension from practice were deemed to make the punishment fit the crime. Five years after this conviction, this Court, asking no question which would have called for disclosure of the conviction, admitted Isserman to its bar, it appearing that he was then in good standing before the courts of New Jersey. Under these circumstances, we do not think we can now attach any weight to this dereliction. . . .
>
> If the purpose of disciplinary proceedings be correction of the delinquent, the courts defeat the purpose by ruining him whom they would reform. If the purpose be to deter others, disbarment is belated and superfluous, for what lawyer would not find deterrent enough in the jail sentence, the *two-year suspension* from the bar of the United States District Court, and the disapproval of his profession? If the disbarment rests, not on these specific proven offenses, but on atmospheric considerations of general undesirability and Communistic leanings or affiliation, these have not been charged and he has had no chance to meet them. We cannot take judicial notice of them. On the occasions when Isserman has been before this Court, or before an individual Justice, his conduct has been unexceptionable and his professional ability considerable.

> We would have a different case here if the record stood that Isserman, with others, entered into a deliberate conspiracy or plans to obstruct justice. But that charge has been found by the Court of Appeals to lack support in the evidence, and again in the disciplinary proceeding in District Court it was not found to be proven. What remains is a finding that he was guilty of several unplanned contumacious outbursts during a long and bitter trial.
>
> Perhaps consciousness of our own short patience makes us unduly considerate of the failing tempers of others of our contentious craft. But to permanently and wholly deprive one of his profession at Isserman's time of life and after he has paid so dearly for his fault, impresses us as a severity which will serve no useful purpose for the bar, the court or the delinquent.

In re Isserman, 345 U.S. 286, 291-92 (1953). (Emphasis added).

In 1954, approximately one and one-half years later, the Supreme Court reopened the Isserman decision after changing its rules to require a majority vote in all disbarment proceedings.[22] See *In re Isserman,* 348 U.S. 1 (1954). In a memorandum opinion the Supreme Court set aside its order disbarring Isserman, concluding that there were no "ground[s] for disbarment of Isserman." *Id.*

Four years later in 1958, Chief Judge Clancy from the United States District Court for the Southern District of New York finally entered Judge Knox's "delayed" memorandum of disbarment. On appeal, however, the Second Circuit reversed the disbarment order and dis-

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22. Rule 8 of the Supreme Court provided that "no order of disbarment will be entered except with the concurrence of a majority of the justices participating."

missed the proceeding entirely. In doing so the Second Circuit stated:

> [M]aking the thorough examination of the record which these cases require us to undertake, we are constrained to conclude that Judge Hincks' very careful and precisely buttressed judgment marks the extent of the punishment appropriate for this appellant. *Indeed, the two-year suspension of Isserman ordered by Judge Hincks cannot be considered other than severe. . .* On the record Isserman's derelictions seem comparatively mild, justifying four justices of the Supreme Court in their statement, "What remains is a finding that he was guilty of several unplanned contumacious outbursts during a long and bitter trial." In re Disbarment of Isserman, supra, 345 U.S. 286, 294, 73 S.Ct. 676, 680, 97 L.Ed. 1013. Hence the two year suspension should have marked the ending of his punishment.

Association of the Bar of the City of New York v. Isserman, 271 F.2d 784, 785 (2nd Cir. 1959) (Emphasis added).

Although Isserman, like petitioner, has been acquitted of any plan to obstruct justice and instead has been found to have committed "several unplanned contumacious outbursts during a long and bitter trial," I conclude, after comparing Isserman's conduct in *Dennis* (which is outlined in part in *United States v. Sacher,* 182 F.2d 416, 430-53 (2nd Cir. 1950)) with petitioner's conduct in *Ford v. Kinzel,* that Isserman's behavior is at least as egregious as petitioner's or worse.[23] But, as set forth in

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23. Indeed petitioner was never sentenced to jail for contempt whereas Isserman was sentenced to jail for six months by the trial judge in *Dennis*. In addition, petitioner, unlike Isserman, has never committed a statutory offense. In fact, prior to this proceeding, petitioner had never been previously disciplined.

the analysis above, Isserman was originally suspended for only two years by the United States District Court for the Southern District of New York and, although this suspension was temporarily replaced by a disbarment order from the same court, the Second Circuit, in reversing the disbarment, stated that even the two year suspension would be over-severe. Furthermore, Isserman was, in effect, suspended by the United States Supreme Court for only one and one-half years. (Indeed, the dissent written by Mr. Justice Jackson in *In re Isserman, supra,* 345 U.S. at 243 asked "what lawyer would not find deterrent enough in the jail sentence, the two year suspension from the bar . . . and the disapproval of his profession.") In contrast, petitioner has been suspended over three years and eight months. Thus, based on this discrepancy, in light of my conclusion that petitioner's conduct in *Ford* is not as bad as that of Isserman's in *Dennis,* I believe that petitioner's punishment is over-severe.

In support of this conclusion is the Supreme Court decision in *Sacher v. Association of the Bar,* 347 U.S. 388 (1954). Sacher, like Isserman, was adjudged guilty of contempt while representing various defendants in *Dennis.* As a result, Sacher was disciplined along with Isserman by Judge Hincks in the United States District Court for the Southern District of New York. However, although Isserman was originally suspended for two years, Sacher was disbarred as of January 11, 1952, because Sacher was found to be guilty of more egregious conduct. On appeal, the United States Supreme Court, after noting that the District Court found no conspiracy or moral turpitude being involved and that the conduct of Sacher "stemmed from excess of zeal for his clients that obscured his recognition of responsibility as an officer of the court," reversed the disbarment order of Judge Hincks on April 5, 1954, and

concluded that "permanent disbarment in this case [was] unnecessarily severe." *Sacher v. Association of the Bar*, 347 U.S. at 388-389. Subsequently, Sacher was not subjected to any further discipline after the Supreme Court decision.[24]

In comparing Sacher's conduct in *Dennis* to petitioner's in *Ford v. Kinzel*, one can only conclude that petitioner's conduct does not begin to compare as Sacher's conduct was far more egregious. *See United States v. Sacher*, 182 F.2d 416, 454 (2nd Cir. 1950). Nevertheless, Sacher was effectively suspended for only two years and three months whereas petitioner, as stated before, has already been suspended for over three years and eight months.

Based on the above analysis and in light of the trial judge's procedures in *Ford v. Kinzel* which should serve in this instance as mitigating circumstances, I conclude that if the object is to deter petitioner and others, like petitioner, then three contempt citations, a suspension from practice for over three years and eight months, and the disapproval of one's profession is excessive and unnecessary. Petitioner's conduct simply represents poor advocacy conducted in good faith and I feel that he has simply been punished enough.[25]

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24. A review of the Sacher file from the Southern District of New York reveals that no further discipline was taken following the Supreme Court reversal. Indeed, the Second Circuit in *Association of the Bar v. Isserman*, 271 F.2d at 785, stated four years after the Supreme Court reversed Sacher's disbarment that no attorney in *Dennis* besides Isserman had been suspended, or disbarred.

25. For the past several years the Judicial Conference Implementation Committee on Admission of Attorneys to Federal Practice has been meeting to devise plans for the improvement of those attorneys seeking to practice in the federal courts, including projects in 14 districts (Ohio not included). This will

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CONCLUSION

I respectfully dissent except as noted above. At the most, I would close this unfortunate event in petitioner's life by reprimanding him and reminding him that he must adhere to the rulings of trial judges, even though they may be erroneous.

Footnote continued—

involve written or oral examinations, requirements of trial experience, peer review, student practice, and continuing legal education or trial advocacy programs. This commendable undertaking should ultimately improve the caliber of attorneys seeking to practice in a federal court. But it deals solely with *admission* to the bar and makes no provision for disciplinary proceedings against incompetent or ill prepared attorneys. Moreover, it will provide for "grandfathering" the attorneys already admitted. Thus, Schulman, now 75 years of age, would not be subjected to the requirements when and if they are actually adopted.

MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed February 12, 1982)

Civil Action C79-1117A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN THE MATTER OF:
MILTON PHILIP SCHULMAN

MEMORANDUM OPINION AND ORDER

CONTIE, *J.*

This proceeding was initiated to determine whether disciplinary action should be taken against respondent Milton Philip Schulman, who is an attorney admitted to practice before the United States District Court for the Northern District of Ohio. The United States Attorney charges respondent with unprofessional courtroom conduct during the course of the civil proceedings in the case captioned *Ford v. Kinzel,* No. C78-1169 (N.D. Ohio, filed Sept. 8, 1978). The following shall constitute the Court's findings of fact and conclusions of law. *See* Fed. R. Civ. P. 52(a).

I.

Prior History

The action in *Ford v. Kinzel* was instituted upon a complaint alleging housing discrimination in violation of 42 U.S.C. §1981 and §1982. A jury trial was commenced on December 12, 1978, and concluded on December 21,

1978. On December 20, 1978, after the jury had retired to deliberate, a disciplinary action was brought against respondent by the trial judge.

The presiding judge, the Honorable Robert B. Krupansky, suspended the proceedings and conducted a show cause hearing to afford respondent the opportunity to demonstrate to the trial court why his name should not be stricken from the roll of attorneys authorized to practice before the United States District Court for the Northern District of Ohio. The trial judge predicated the disciplinary action upon respondent's appearance as counsel for defendants in *Ford v. Kinzel.*

On February 22, 1979, an Order was issued by the trial judge instructing the Clerk to strike respondent's name from the roll of attorneys authorized to appear and engage in the practice of law before the Bar of this District, and imposing conditions for his readmission. This Order was issued in accordance with the trial court's prior Memorandum and Order finding that respondent knowingly and wilfully pursued a course of professional misconduct both prior to and throughout the trial of the *Ford* case.

The United States Court of Appeals for the Sixth Circuit found error in the procedures deployed in the disciplinary proceeding against respondent. The Sixth Circuit articulated two reasons for its conclusion. First, the Court determined that there was no apparent urgency requiring the show cause hearing to be conducted upon the short notice given respondent. Second, the Court concluded that the matter should have been referred to another judge because of the marked personal feelings on both sides. The Order disciplining respondent was therefore vacated and the case remanded. The matter was then reassigned to this Court for further proceedings.

II.

Disciplinary Enforcement in the United States District Court for the Northern District of Ohio

Local Civil Rule 2.09 embodies the only published expression of the procedures and professional standards governing disciplinary enforcement in this District. It provides in relevant part that

> Any member of the Bar of this Court may, for good cause shown and after having been given an opportunity to be heard, be disbarred, suspended from practice for a definite time, reprimanded, or subjected to such other discipline as the Court may deem proper.[1]

Respondent challenges on constitutional grounds the paucity of published guidelines for disciplinary enforcement in this District and, therefore, the propriety of the instant action. At issue is the legitimate scope of the federal court's power to regulate the members of the legal profession admitted to practice before it. It is a power that must be exercised consistent with both the procedural and substantive components of the Due Process Clause. Respondent's constitutional challenge is not insubstantial and requires careful analysis.

Regulating the discipline of attorneys practicing before the federal courts was the subject of legislation introduced in Congress in 1971, 1973, and 1975. Faced with the threat of legislative interference, the Standing Committee on Professional Discipline of the American Bar Association embarked upon the formidable task of drafting uniform model

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1. Local Civil Rule 2.09 also contains provisions governing the effect of disciplinary actions by other courts and the unauthorized practice of law in this District, which are not pertinent to the within disciplinary proceeding.

disciplinary rules for the federal courts. The need for model rules was also evident "because federal discipline in many parts of the country is disorganized, nonuniform, in violation of due process, and detrimental to the reputation of the profession in the eyes of the public." ABA Reports to the House of Delegates at 5 (February, 1978). The laudable efforts of the ABA produced the Model Federal Rules of Disciplinary Enforcement, which has been adopted by a number of the courts in the federal system.

However well-advised it may be either to adopt in some form the Model Federal Rules of Disciplinary Enforcement or to draft comparable exacting procedures and standards, that this District has published what amounts to no more than an acknowledgement of the authority to regulate professional conduct does not alone compromise the constitutional guarantees of the Due Process Clause. The inherent power and obligation of the judiciary to monitor in the public interest the ranks of those who practice before it has a history preceding that of the federal court system.

It is a traditional rule of the common law courts that the power to conduct disciplinary actions against members of the Bar rests exclusively with the court. *See Ex parte Secombe,* 60 U.S. (19 How.) 9, 13 (1856). This power is a derivative of the court's inherent authority to admit attorneys to practice. *See Ex parte Robinson,* 86 U.S. (19 Wall.) 505, 512 (1873); *In re Echeles,* 430 F.2d 347, 349 (7th Cir. 1970). "The federal court is free to and should take measures against unethical conduct if and when it occurs in connection with any proceeding pending before it." *Sanders v. Russel,* 401 F.2d 241, 246 (5th Cir. 1968).

The manner in which disciplinary proceedings are conducted is a matter of judicial discretion. *See Randall*

v. Brigham, 74 (7 Wall.) 523, 540 (1968); *In re Ming,* 469 F.2d 1352, 1355 (7th Cir. 1972). There is no indispensable constitutional requirement that this judicial discretion only be exercised in accordance with procedures that are published as local rules. What due process does require, however, is that the disciplinary power is not used in an oppressive, arbitrary or unfair fashion. *See In re Ruffalo,* 390 U.S. 544, *rehearing denied,* 391 U.S. 961 (1968); *Randall v. Brigham, supra; Ex parte Secombe, supra.* Exclusion from the practice of law cannot be accomplished in a manner or for reasons in contravention of the Due Process Clause. *Willner v. Committee on Character and Fitness,* 373 U.S. 96 (1963). *Schware v. Board of Bar Examiners,* 353 U.S. 232 (1957).

The procedural component of the Due Process Clause requires fair notice of the charges of misconduct and a meaningful opportunity to show cause why the accused practitioner should not be disciplined. *See In re Ruffalo, supra* at 555; *Theard v. United States,* 354 U.S. 278, 282 (1957); *In the Matter of Massengale,* 554 F.2d 301 (6th Cir.), *cert. denied sub nom., Massengale v. United States District Court for the Eastern District of Kentucky,* 434 U.S. 927 (1977). All the procedures necessary to protect against an erroneous deprivation of a property interest have been made available to respondent in the instant action.

Respondent has had the benefit of those procedures attendant adversary judicial proceedings. Notice of the charges of professional misconduct were served. Ample opportunity with benefit of counsel to file pre-trial motions, submit written briefs, and prepare competent proofs for trial was afforded. Testimonial and documentary evidence was adduced under the test of the rules of evidence and was duly received by the Court through a formal

adjudicatory show cause hearing. Impartiality has been enhanced by the reassignment of these proceedings to this Court.

The substantive component of the Due Process Clause requires that the professional standards circumscribing the conduct regulated provide advance and specific warning of the conduct prohibited. *In re Bithoney,* 486 F.2d 319, 324 (1st Cir. 1973); *Halleck v. Berliner,* 427 F.Supp. 1225, 1240 (D.D.C. 1977). The professional standards imposed can legitimately proscribe only that "conduct which all responsible attorneys would recognize as improper." *In re Ruffalo, supra* at 555 (White, J., concurring). It is impermissible for a federal court to "deprive an attorney of the opportunity to practice his profession on the basis of a determination made after the fact that conduct is unethical if responsible attorneys would differ in appraising the propriety of that conduct." *Id.* at 556.[2]

The nature of the charges against respondent satisfied the substantive due process requirements for disciplining a member of the Bar in this District. Local Civil Rule 2.09 establishes a "good cause shown" standard for disciplining any member of the Bar. Local Civil Rule 2.06 requires each applicant to take or subscribe to an Oath of Affirmation that obliges, *inter alia,* the attorney to conduct himself "according to the law and the recognized standards of conduct." Within the legal profession the recognized standard of conduct is the ABA Code of Pro-

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2. It is important to distinguish the constitutional problems caused by retrospective application of vague standards from the difficulties in determining whether marginal conduct falls below recognized professional standards. That the chore of deciding the marginal case is an arduous one does not taint an otherwise constitutional standard of professional conduct. *See* United States v. Nat'l Dairy Products Corp., 372 U.S. 29, 32 (1963); United States v. Harris, 347 U.S. 612, 618 (1954).

fessional Responsibility. Thus, Local Civil Rule 2.06 places each attorney admitted to practice in the District on notice that the contours of the good cause standard are set by the Code of Professional Responsibility.

That the District has not republished the Code word for word in its Local Civil Rules does not render the good cause standard unconstitutionally vague.[3] The exactness of the standard is abundantly apparent when examined in the context of a discrete professional group. "The legal profession has developed over a considerable period of time a complex code of behavior . . . ." *In re Bithoney, supra* at 324. It is to these professional standards embodied in the ABA Code of Professional Responsibility that the phrases "for good cause" and "the recognized standard of conduct" refer. Local Civil Rule 2.06 & 2.09.

III.

The Charges of Misconduct Against Respondent.

Twenty specific acts of misconduct have been noticed in support of the United States Attorney's general charge that respondent intentionally pursued a course of conduct designed and calculated to disrupt the orderly resolution of the cause of action commenced in *Ford v. Kinzel.*[4] Each of the twenty specifications of misconduct shall be examined within the parameters of one or more of four general categories of courtroom misconduct.

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3. The good cause standard of this District is no less specific than the general reference made to the Code in Rule IV(B) of the Model Federal Rules of Disciplinary Enforcement: "Acts or omissions by an attorney admitted to practice before this Court, individually or in concert with any other person or persons, which violate the Code of Professional Responsibility adopted by this Court shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship."

4. The twenty specifications of misconduct charged are set out in full in the appendix.

In support of the allegations, the United States Attorney relies heavily upon the pre-trial and trial record in *Ford v. Kinzel.* Additional testimonial evidence was received by the Court relative to respondent's trial demeanor. Respondent also testified on his own behalf. Medical testimony and documentation was received on the issue of respondent's physical and mental health at the time of trial. The United States Attorney introduced the transcript of a state trial in rebuttal to the medical opinion evidence submitted on respondent's behalf.

Respondent is a septuagenarian and a solo private practitioner. He appeared unassisted in *Ford v. Kinzel* as counsel for defendants and had no previous experience in either civil rights cases or federal litigation. The *Ford* case was marked by high levels of emotion on the part of counsel, the parties, and the witnesses. Plaintiff is an attorney with twenty years experience in the state courts. Prior to the instant action, respondent had never been the subject of a disciplinary proceeding. His conduct during the *Ford* case, however, resulted in three summary citations for contempt pursuant to Fed. R. Crim. P. 42(a), and the institution of the within disciplinary action.

The Court finds, as charged by the United States Attorney, that respondent knowingly and wilfully pursued a course of conduct both prior to and throughout the *Ford* trial designed and calculated to disrupt the orderly resolution of the case. Turning to the four general categories of courtroom misconduct in which twenty specifications charged are grouped, the clear and convincing weight of the evidence[5] duly received by the Court establishes the following:

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5. For the proposition that the "clear and convincing" standard is the appropriate burden of proof in a disciplinary proceeding, see Collins Security Corp. v. SEC, 562 F.2d 820 (D.C.

(Continued on following page)

A.

Pre-trial Conduct: Specification No. 1.

On September 11, 1978, the trial court issued its standardized eighteen page Order that prescribed a detailed set of rules and procedures governing the pre-trial practice and discovery of counsel. The standard Order issued in civil cases by the trial judge accommodates the interests of judicial economy and facilitates counsel in the preparation and presentation of the case. The final pre-trial was scheduled for December 11, 1978, and trial proceeded as scheduled on December 13, 1978. With costs assessed to defendants, the trial judge granted respondent an extension that delayed completion of the pre-trial until the following morning. During the pretrial stage, respondent's inadequate grasp of the federal and local rules governing civil proceedings first surfaced and the trial judge forewarned him to correct the situation.

It is clear from the record that respondent failed to comply with the September 11th Order as set forth in paragraphs (a) through (e) and (g) of specification no. 1. Paragraph (f) contains the allegation that respondent did not file a witness list prior to December 11, 1978, but there is nothing to suggest that he was so required. Witness lists were to be filed at the last pre-trial. At that time an incomplete, hand-written list was submitted.

Footnote continued—

1977); *In re* Fisher, 179 F.2d 361 (7th Cir.), *cert. denied sub nom.*, Kerner v. Fisher, 340 U.S. 825 (1950); *In re* Ryder, 263 F.Supp. 360 (E.D. Va.), *aff'd*, 381 F.2d 713 (4th Cir. 1967). It is the charging party that has the ultimate burden of proving that the attorney should be disciplined. Charlton v. FTC, 543 F.2d 903, 906 (D.C. Cir. 1976). *But cf. In re* Isserman, 345 U.S. 286 (1953) (Under the Supreme Court's local rules, respondent has the burden to show cause why he should not be disciplined where he previously has been disbarred from practice in any State.).

The October 31st Order set a completion date for the pre-trial preparation required by the September 11th Order. Respondent failed in substantial part to meet the deadline, which caused the final pretrial to be concluded the following morning. Respondent's noncompliance was not the result of a simple failure to pay attention or to give proper regard to the pre-trial Order.

Initially, respondent explained that he simply misread the completion date. Qualified by the statement that it was no offered as an excuse, respondent also explained upon inquiry of the trial judge that his ability to comply was hampered by a medical condition and treatment. Also, it is clear that respondent's complete lack of prior exposure to the stringently enforced and legitimately detailed local pre-trial requirements beget the problems encountered.

Central to specification no. 1 is the allegation that respondent "advised the Court that he had disregarded the Court's Order of September 11, 1978." But this was not the case. At no time during the final pre-trial was the trial court so advised by respondent. The burden of proof has not been met relative to the charge that deliberate disregard on the part of respondent caused the delay of the pre-trial proceedings. It is important to note, however, that respondent did not give prior notice of his inability to comply.

B.

Behavior Demeaning Witnesses and Improperly Influencing Jury: Specifications Nos. 2, 3, 5, 6, 11, 12, 13, 17, 19, 20

Much of respondent's behavior toward witnesses and conduct in front of the jury is memorialized in the transcript of the trial in *Ford v. Kinzel.* Additionally, this Court received testimony from two attorneys representing

plaintiff Ford and an attorney who was at that time employed as a law clerk by the trial judge and present during a majority of the *Ford* trial.

Prior to opening statements, counsel were instructed by the trial judge to extend every courtesy to the witnesses. Counsel were directed not to incorporate suggestions or innuendo into their questions. Counsel were also cautioned not to engage in expressions indicating disbelief or other emotional displays as the result of any answer elicited from a witness. Answers by witnesses were not to be interrupted. The instructions summarize the trial court's local rules on courtroom procedure.

Contrary to these initial instructions and continued subsequent admonitions, respondent consistently projected a hostile demeanor toward both adverse and ostensibly neutral witnesses. His examination of these witnesses was generally conducted with modulating tonal inflections, facial expressions, and gesticulations that often conveyed sarcasm and disbelief. He often interrupted the responses given by witnesses. Many of his questions were argumentative and bellicose in content and excessively vociferant in delivery.

The subject matter of many of respondent's questions had no legitimate evidentiary basis. These questions lacked material probative value and served only to disparage inexcusably the witness.

For example, respondent asked plaintiff whether her purpose in discussing the housing incident with her daughter was to arouse her children to dislike Whites. Respondent also attempted to insinuate, without materiality or relevance to the issues joined in the case, that plaintiff was having marital problems. Respondent also pursued without foundation a line of questioning intimating

that plaintiff was not leading a good Christian life because she didn't pay her bills in a timely fashion. Similarly pursued without foundation and through innuendo was the role of plaintiff's attorney relative to the medical prescription for Valium she received. Respondent accused plaintiff of suborning perjury and accused plaintiff and her attorney of conspiracy to defraud.

Even after the trial judge had admonished respondent that there was no inconsistency between plaintiff's direct testimony and her affidavit filed with the complaint, he persisted in attempting to characterize her testimony as inconsistent. Deposition testimony was utilized in a manner that distorted its content and projected and illusion of inconsistency.

At one point a witness was asked, without a scintilla of materiality, whether she was married to the man she was living with. The calculated manner in which respondent consistently framed questions with innuendo and prejudicial remarks ultimately resulted in a finding of contempt by the trial judge. On two occasions these abusive tactics compelled the trial judge to cut off respondent's examination.

The trial transcript, supplemented by the testimony of others present during the proceedings, attests to the outrageously demeaning and contemptuous attitude respondent displayed toward many of the witnesses. This conduct persisted in direct violation of the trial court's initial warnings and subsequent admonitions to cease.

Respondent's gesticulations during judicial rulings, side bar conferences, and examination of witnesses were calculated to prejudice the jury. Facial expressions visible to the jury were used by respondent to convey disbelief or dissatisfaction with bench rulings. At side bar insub-

stantiate accusations of perjury, deceit, and conspiracy were wielded by respondent at plaintiff, witnesses, and plaintiff's counsel. In examining witnesses, respondent often depicted prior testimony, exhibits, and depositions in a manner calculated to create the illusion of impeachment.

The volume with which these factitious outbursts were often delivered made many of the remarks audible to the jury. Thus, the trial judge frequently directed respondent to lower his voice. On one occasion a motion for mistrial was made before the jury. This outburst resulted in another citation for contempt issued by the trial judge against respondent.

There were other occasions where respondent's argumentative outbursts directed at witnesses and the trial judge were either made in front of the jury or at a volume clearly audible to the jury. These outbursts were directly responsible for at least one of the times the trial judge was forced to send the jury out of the courtroom. Again, respondent was cited for contempt of court. It is clear that respondent consciously engaged in a trial strategy designed to draw upon theatrics and the improper use and misrepresentation of evidence to prejudice the jury. Without evidentiary foundation, respondent consistently expressed his personal opinion that the lawsuit was a fabrication and that the witnesses were deceitful.

C.

Disrespectful Remarks to the Judge and Refusal to Comply with Proper Court Procedures and Orders: Specifications Nos. 4, 5, 6, 7, 8, 9, 10, 12, 13, & 14

In addition to the acts of misconduct directed toward the witnesses and jury, respondent violated a number of the other local rules of the trial court. A local order on

courtroom procedure is placed at each counsel table. Also, copies are made available for inspection elsewhere in the courthouse during business hours. A number of items were reiterated by the trial judge immediately prior to opening statements.

The trial judge emphasized the following local rules of courtroom procedure: Interrogation of witnesses should be conducted with counsel positioned behind the lecturn. Interposing objections requires that counsel rise and simply state the objection without proffering any reason or explanation. Support for objections could be placed on the record by requesting permission to approach the bench. The issue raised through an objection is concluded upon the trial court's ruling, and counsel shall not thereafter persist in arguing the matter.

During the interrogation of witnesses, respondent often left the lecturn without the permission of the trial judge. It was not an infrequent occurrence for the trial judge to instruct respondent either to be seated or to return to the lecturn. The trial judge described respondent's excessive movement as "roaming around" the courtroom.

Many of respondent's objections were accompanied by attempts to proffer spontaneous arguments in support thereof. Also, respondent failed to respect the finality of the rulings issued by the trial judge, and accused the trial judge of prejudicing his client's case. Upon receiving an adverse ruling, respondent would on occasion become overly argumentative. There was an exchange on an evidentiary issue where respondent defiantly asserted that he "would like to try my case my way." The trial judge immediately repeated his ruling that the area of inquiry was improper. Respondent then replied: "How do you know?"

Respondent submitted his exhibits in an unbound and unmarked stack of disorganized materials. Exhibits were not accompanied by the required index. This total disregard for the local rules made it impossible for respondent to refer to his exhibits other than by a general description. At times respondent had to rely upon the trial court's direction and indulgence in locating copies of exhibits.

Respondent's challenge to the patience of the trial judge rose to the level of derision. Especially with respect to evidentiary rulings, respondent refused to adhere to the trial court's admonitions. Avenues of inquiry were pursued notwithstanding the court's explicit orders that the subject was outside the legitimate scope of examination. For example, respondent attempted to continue the interrogation of plaintiff on the subject of her previous residence in direct violation of the trial court's order to move on to another line of inquiry. When the trial court again instructed respondent to go to another subject, he requested that the judge excuse the jury so he could pursue further argumentation.

There is also ample evidence in the record that respondent lacks the basic working knowledge of the Federal Rules of Evidence and the Federal Rules of Civil Procedure, which is quintessential to the competent discharge of a federal practitioner's professional responsibilities. During the direct examination of defendant's first witness, respondent interrupted the interrogation, approached the bench, and renewed a previously overruled motion for a directed verdict.

Included among the other more egregious examples of respondent's lack of competency in these fundamental areas of trial practice are the following: Respondent demonstrated an inability to frame appropriate questions on either direct or cross examination. Most of his ques-

tions on direct examination were leading. Respondent attempted to pose leading questions to witnesses called during defendants' case without laying the appropriate foundation that the witnesses were hostile. He attempted to cross examine witnesses on subjects beyond the scope of direct examination and unrelated to credibility. Attempts were made without foundation to use deposition testimony to impeach. These attempts were generally improper because either the deposition testimony was not inconsistent or the witness was not first interrogated on the subject matter.

D.

Delay of the Trial Proceedings Specifications Nos. 7, 8, 9, 10, 15, 16, 18, & 19

Many of the acts of misconduct discussed above resulted in a substantial delay and waste of judicial resource. Respondent's failure to comply with the trial court's order regarding the preparation of exhibits for trial resulted in a substantial loss of courtroom time. Random searches through the courtroom for exhibits, which respondent could refer to only by description, were not an infrequent occurrence. His treatment of witnesses and demeanor before the jury required the trial judge to send the jury out so that the proper admonitions could be given. Additional court time was expended for the three times the trial judge interrupted the proceedings to sanction respondent for contumacious conduct.

Much time was consumed by respondent's persistence in making arguments to the bench on issues that were either exhausted or conclusively resolved by a ruling of the trial judge. Respondent's lack of knowledge in some of the most basic areas of trial practice and procedure compelled the trial judge to halt the proceedings on a

number of occasions. Respondent continued to pursue repetitious and improper lines of inquiry contrary to the rulings and admonitions of the trial judge. The courtroom conduct of respondent extended what should have been a two day trial into a five day affair.

E.

Medical Disabilities

The deposition testimony of Fred Adelstein, M.D. an ear, nose, and throat specialist, was received into evidence without objection by the United States Attorney.[6] Based upon an examination, Dr. Adelstein offered his medical opinion that respondent has a hearing loss for the spoken word at fifteen feet. Because he was unable to treat the problem, Dr. Adelstein advised respondent to go to the Cleveland Clinic for an audiogram to determine whether a hearing aid would remedy his hearing loss. No evidence was offered to rebut the medical testimony of Dr. Adelstein.

Respondent complained of a hearing impediment during both the *Ford* case and the within proceedings. No explanation, however, has been offered for respondent's apparent failure to seek corrective treatment sufficient to satisfy the demands of trial practice. There is no indication that respondent heeded Dr. Adelstein's advice to undergo further examination to determine the permanency of the hearing loss and whether a corrective device would mitigate his hearing impediment.

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6. On Tuesday, February 26, 1980, during the trial proceedings commenced before this Court in the instant case, respondent offered the deposition of Dr. Adelstein that was filed on February 25. After hearing the oral arguments of the parties on the issue of the admissibility of the deposition, the Court requested written notice from the United States Attorney advising the Court as to what action the government proposed to take. The Court having been advised of no action the government seeks to take, the deposition shall be received pursuant to Fed R. Civ. P. 32(a)(3)(E).

Thus, the Court finds that respondent suffers from a hearing impediment that makes it physically impossible for him to function unassisted as a trial attorney. In light of the demands litigation places upon the attorney, a hearing loss for the spoken word at fifteen feet is a physically disabling condition.

Testimony from Stuart F. Younger, M.D., was adduced on the issue of respondent's state of mind during the *Ford* case. Dr. Younger's area of specialization includes the psychological reaction of drugs used to treat illness.

At the time of the *Ford* trial respondent was suffering from and under treatment for Hodgkin's disease. He began chemotherapy on December 15, 1977, which continued until his last treatment on December 17, 1978. The treatment protocol consisted of the cyclic ingestion of four different drugs. Included in the cycle was the daily ingestion of high dosages (60 mg.) of Prednisone for a ten day period.

Prednisone is a member of the glucocorticoid class of drugs. In high dosages this class of drugs has a 40% to 80% incidence psychological disturbances in patients. The side effects include: euphoria, insomnia, mood swings, personality changes, and severe depression.

Dr. Younger conducted an investigation upon respondent's request to form a medical opinion of the effect of chemotherapy on respondent's behavior during the *Ford* trial. Respondent's medical records for hospitalization and outpatient chemotherapy treatment were reviewed by Dr. Younger. Three family members and an employee of respondent were briefly interviewed. Dr. Younger performed a one hour psychiatric interview and examination of respondent. Also, a copy of the twenty specific acts of misconduct filed by the United States Attorney was reviewed.

Based upon his investigation, Dr. Younger concluded that respondent underwent significant psychological deterioration following his diagnosis of Hodgkin's disease, which was directly attributable to (1) emotional stress accompanying the diagnosis of a malignancy and (2) the direct physical effects on the brain and nervous system by Prednisone. Although these two factors were identified as contributing to respondent's courtroom behavior, the psychological effect of the former, if any, was not accounted for in Dr. Younger's medical opinion. Nonetheless, Dr. Younger concluded the medical evaluation with his diagnostic impression that the behavioral and intellectual problems as indicated in the charges of misconduct were a direct result of respondent's chemotherapy for cancer.

Dr. Younger's medical opinion was the product of comparative analysis. He garnered information relative to respondent's behavior before and after chemotherapy. Dr. Younger concluded that during the course of chemotherapy respondent underwent a dramatic change in personality. Dr. Younger's investigation revealed that respondent manifested contentious and irascible behavior prior to chemotherapy, and that this behavior became somewhat exaggerated after treatment for cancer began. He further concluded that the change was directly attributed to side effects of Prednisone. Dr. Younger admitted that his opinion of the cause of the behavioral problems would change if there was evidence of similar behavior on the part of respondent prior to the diagnosis of Hodgkin's disease.

The Court finds the medical opinion that respondent's behavioral problems were a direct result of his chemotherapy for cancer to be inconclusive. The only basis for the evaluation of respondent's courtroom behavior during the *Ford* case is respondent's selfserving description

of his professional conduct and the specifications charged by the United States Attorney. Dr. Younger did not interview anyone present during the *Ford* trial and did not consider the testimony before this Court by witnesses present during that trial. Nor did he review any portion of the transcript of the proceedings in the *Ford* case. Respondent's family members and his employee were only briefly interviewed for a period of fifteen minutes each. Also, the factor of emotional stress accompanying the diagnosis of Hodgkin's disease was identified but not otherwise taken into account. This seriously detracts from Dr. Younger's opinion on the cause of respondent's behavioral disorders.

Therefore, the underlying facts considered by Dr. Younger are insufficient to support his initial determination that there was a substantial deterioration of respondent's behavioral patterns directly caused by chemotherapy treatments.

Additionally, Dr. Younger candidly admitted that his medical opinion on the effect of the chemotherapy would change if it were shown that respondent manifested the same type of behavioral patterns prior to treatment. In *Levy v. Stokes*,[7] Case No. 884,045 (Court of Common Pleas for Cuyahoga County, Ohio, filed 1970), respondent represented a number of policemen in a negligence suit for personal injury. The case was tried before a jury, commencing on April 28, 1977, and concluding on May 18, 1977. These proceedings were completed prior to respondent's chemotherapy treatments.

The transcript of the *Levy* trial evinces a courtroom demeanor on the part of respondent comparable to that

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7. The 2,542 page transcript was offered by the United States Attorney and received by the Court solely as rebuttal evidence to the medical testimony of Dr. Younger.

projected at the *Ford* trial. The transcript is replete with examples of respondent's argumentative attitude toward the evidentiary rulings and other orders of the trial judge. During exchanges between counsel and the trial judge, respondent persevered in making the last and sometimes disrespectful remark to the bench. At one point the court requested respondent to be patient for a moment while the trial judge placed two questions before a witness. He responded: "Well, I've got lots of time, as long as I have an opportunity to be heard." Respondent also asserted that he was not bound by the orders of the trial court. A myriad of problems attesting to respondent's unfamiliarity with the rules of evidence and trial procedure surfaced throughout the *Levy* trial.

Based upon the trial transcript in the *Levy* case, it is clear that there is little significant difference between respondent's trial demeanor prior to chemotherapy and his conduct in the *Ford* trial. The presence of a marked change in behavior constituted the crucial underlying factual predicate relied upon by Dr. Younger in reaching his medical opinion on effects of Prednisone on respondent. The similarity in respondent's behavioral patterns exhibited in the *Ford* and *Levy* cases strips Dr. Younger's medical opinion of probative value.

IV

Violations of the ABA Code of Professional Responsibility.

It is the responsibility of the federal courts to take disciplinary action against any attorney "who has engaged in conduct inconsistent with the standard expected of officers of the Court." *In re Isserman*, 345 U.S. 286, 289 (1953). The conflict inherent in every disciplinary proceeding, and therefore the overriding issue, "is the

public interest and the attorney's right to continue to practice a profession imbued with public trust." *In re Echeles, supra* at 350.

A.

Legal Defenses

Respondent interposes a number of legal arguments challenging the propriety of enforcing disciplinary sanctions against respondent for his actions in the *Ford* case. Each argument touches upon the tension involved in weighing the public interest against the attorney's right to continue his chosen profession.

First, respondent asserts that his trial conduct amounts to no more than a good faith attempt to zealously press his client's case. *See* ABA Canons of Professional Responsibility No. 7.[8] It is beyond peradventure that the uninhibited ability of an attorney to draw upon all reasonable, good faith measures to advance the client's interests is essential to the fair administration of justice. *In re McConnell,* 370 U.S. 230, 236 (1962). "An independent judiciary and a vigourous, independent bar are both indispensable parts of our system of justice." *Id.*

That an attorney must be allowed to engage in vigorous advocacy cannot, however, justify all conduct designed to protect the client's interests. *In re Dellinger,* 461 F.2d 389, 398 (7th Cir. 1972). The right to press an issue persistently extends only to the point that a ruling is made by the court. No matter how unfounded the ruling may appear to the attorney, neither resistance nor insult to the court can be tolerated once the issue is preserved for appeal. *See Sacher v. United States,*

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8. Canon 7 provides: A lawyer should represent a client zealously within the bounds of the law.

343 U.S. 1, 9 (1952); *United States v. Schiffer*, 351 F.2d 91, 94 (6th Cir. 1965). Any other rule would subject the courts to the temperament of the attorneys and at the cost of the orderly administration of justice. *See* ABA Ethical Consideration of Professional Responsibility No. 7-37. Respondent's persistence in arguing issues beyond the trial court's instructions, rulings, and admonitions transgresses the bounds of zealous advocacy.

Second, respondent asserts that the within disciplinary action is commenced against him solely to vindicate the trial court's local rules of etiquette and decorum. Respondent's acts of misconduct violate established rules of professional conduct as well as the trial court's local rules and his argument is therefore without merit. Furthermore, "[i]t is essential to the proper administration of . . . justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country." *Illinois v. Allen*, 397 U.S. 337, 343, *rehearing denied*, 398 U.S. 915 (1970).[9] The trial court's local rules are legitimately designed to accommodate the orderly administration of justice. *See* ABA Ethical Consideration of Professional Ethics No. 7-37.

Third, respondent contends that acts of misconduct occurring during the course of a single trial are insufficient grounds to support disciplinary action. There may be some degree of validity to this argument where the disciplinary action is brought upon a single act of forensic

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9. *But cf.* N. Dorsen & L. Friedman, Disorder in the Court 138 (1973):

> Some of [the specific local rules for the proper conduct of a lawyer in court] are common sense, others are quite petty. They are suggested rules of etiquette rather than definitive rules of conduct, and therefore should be considered an ideal standard of how a lawyer should behave in court rather than a minimum code of conduct whose violation may lead to a contempt citation or disciplinary action.

misconduct at trial, as opposed to several unprofessional acts during the course of a single trial. Similarly, acts of misconduct confined to one trial may not constitute a fair basis for disbarment but can certainly warrant a less severe sanction. *See Kentucky State Bar Association v. Taylor,* 482 S.W. 2d 574 (Ky. 1972).

Beyond these concerns, respondent's argument lacks persuasiveness. The most flagrant of respondent's acts of misconduct drew three separate citations for contempt by the trial judge. "Frequent and repeated punishment for contempt of court indicates a lawyer is not fit to practice." *Id.* at 584.

Furthermore, only in the most egregious case of delay or contumacious conduct can the court resort to dismissal of the case in order to exercise control over the litigation process. *See Silas v. Sears, Roebuck & Co., Inc.,* 586 F.2d 382, 385 (5th Cir. 1978). "Absent this showing, an order of dismissal is an abuse of discretion; the court is limited to lesser sanctions designed to achieve compliance." *Carter v. City of Memphis, Tennessee,* No. 79-1059, slip op. at 4 (6th Cir., decided Dec. 29 1980). Such lesser sanctions include disciplinary action. *Silas, supra* at 385 n.3. The unavailability of the disciplinary sanction for misconduct confined to a single trial would serve only to limit further the trial court's ability to maintain control over the litigation process.

Finally, respondent claims that his poor state of health excuses his behavior during the *Ford* trial. For the reasons stated above, Dr. Younger's medical opinion concerning the psychological effects of chemotherapy is unconvincing. Moreover, the existence of a hearing impediment is wholly unrelated to much of respondent's courtroom behavior. Thus, there is no factual support

for respondent's initial claim that his courtroom behavior is attributable to poor health.

Assuming arguendo that respondent had established a causal link between his courtroom behavior and poor health, the defense that physical or medical disorder constitutes an excusing condition is without legal foundation. Disciplinary action is not taken against an attorney to punish acts of misconduct. Rather, the overriding purpose of such proceedings is the protection of the public interest. Concomitantly, it is imperative to promote and maintain public confidence in the judicial system and legal profession. For this reason, neither physical nor mental disability can excuse professional misconduct. *See e.g. In re Richard K. Houtchens,* 555 S.W. 2d 24 (Mo. 1977); *Columbus Bar Association v. Edwards,* 11 Ohio St. 2d 171, 173 (1967); Annot., 96 A.L.R. 2d 739, 741 (1964).

B.

Disciplinary Rule 7-106

The Disciplinary Rules of the ABA Code of Professional Responsibility are mandatory in character and set the minimum level of professional conduct. Whenever an attorney's conduct falls below these minimum standards, he will be subject to disciplinary action. ABA Disciplinary Rules of Professional Responsibility No. 1-102 (A)(1).

Disciplinary Rule 7-106(C) prescribes the minimum standard of professional conduct for courtroom appearances:

> In appearing in his professional capacity before a tribunal, a lawyer shall not:
>
> (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case

or that will not be supported by admissible evidence.

(2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.

. . .

(4) Assert his personal opinion as to the justness of a cause, as to the credibility, of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

(5) Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply.

(6) Engage in undignified or discourteous conduct which is degrading to a tribunal.

(7) Intentionally or habitually violate any established rule of procedure or of evidence.

Respondent intentionally pursued the following patterns of misconduct throughout the *Ford* trial, which were designed and calculated to disrupt the orderly resolution of the case: (1) behavior demeaning to witnesses and prejudicial to the jury, (2) disrespectful remarks to the judge and refusal to comply with proper courtroom procedures and orders, and (3) delay of the trial proceedings. Based upon the specific acts of misconduct, as fully discussed above, that disrupted the orderly resolution of the *Ford* case, the Court hereby finds that respondent violated Disciplinary Rule 7-106(C) of the ABA Code of Professional Responsibility.

Specifically, he continued to argue matters that could not be supported by admissible evidence; he prodded into areas that were irrelevant to the case and intended solely to degrade witnesses; he asserted his personal opinion that the case was fabricated and that the witnesses were deceitful; he failed to comply with the trial court's local rules without giving notice of his intent not to comply; he was discourteous to the trial judge; and he habitually violated the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure.

C.

Mitigating Circumstances

In tailoring the appropriate sanction for respondent's unprofessional conduct, the following factors are relevant. Respondent is over 70 years old and has practiced for over 20 years. His acts of misconduct are confined to a single trial. The *Ford* case was respondent's first court appearance in federal court. He has never been the subject of any disciplinary proceeding prior to the within action. Although these factors cannot excuse violations of the professional standards of conduct, they are considerations important to determining the severity of the sanction.

V.

Conclusion

Accordingly, it is hereby ordered that Milton Philip Schulman shall not be permitted to practice in the United States District Court for the Northern District of Ohio or before any officer thereof as an attorney or to commence, conduct, prosecute or defend any action, proceeding or claim in which he is not a party concerned

unless and until such time as he satisfies the following conditions and complies by the following restrictions:

1. Respondent shall forthwith subscribe to an oath of affirmation to this Court, and filed with the Clerk, that he will maintain an abiding commitment to conduct himself in a manner commensurate with the ABA Code of Professional Responsibility and in accordance with the local courtroom rules of all the federal judges in the Northern District of Ohio.

2. Respondent shall satisfactorily demonstrate through sworn affidavit to this Court, and filed with the Clerk, that he has achieved a proficiency in and understanding of the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, the Local Civil Rules for the Northern District of Ohio, and the ABA Code of Professional Responsibility.

3. Upon duly executing and filing the aforementioned affidavits, respondent's practice in this District shall be restricted as follows:

   A. Respondent shall first attend and observe six contested testimonial trials, at least three of which must be jury trials, in the United States District Court for the Northern District of Ohio. Respondent's attendance and observation shall be certified through sworn affidavit to this Court, by an attorney of record participating in the trial, and filed with the Clerk.

   B. Thereafter, in view of respondent's hearing impediment and his unprofessional courtroom conduct in the *Ford* trial, he shall not appear without co-counsel in any status call, pretrial,

arraignment, sentencing, trial, or other courtroom proceeding in the United States District Court for the Northern District of Ohio.

4. Respondent's name shall remain on the roll of attorneys admitted to practice in this District only so long as he conducts himself in accordance with both the aforementioned restrictions and the ABA Code of Professional Responsibility.

IT IS SO ORDERED.

/s/ LEROY J. CONTIE, JR.
U.S. District Judge

Appendix

The United States Attorney charged:

A review of the record discloses that Schulman knowingly and wilfully pursued a course of conduct both prior to and throughout the trial of this cause designed and calculated to disrupt the orderly resolution of this litigation, as follows:

1. The final pretrial hearing scheduled for December 11, 1978, pursuant to the Court's Order of October 31, 1978, was required to be aborted and rescheduled because Schulman, at the hearing, advised the Court that he had disregarded the Court's Order of September 11, 1978, and had:

(a) failed to identify, mark and exchange proposed exhibits with opposing counsel on November 29, 1978, as ordered by the Court;

(b) failed to inform opposing counsel on November 29, 1978, of testimony intended to be introduced at trial by way of deposition as ordered by the Court;

(c) failed to file with the Court by not later than December 11, 1978, a sequential index listing all documentary and non-documentary exhibits intended to be used at trial as ordered by the Court;

(d) failed to identify, mark and file with the Court and opposing counsel by not later than December 11, 1978, exhibits intended to be used at trial as ordered by the Court;

(e) failed to consult with opposing counsel prior to December 11, 1978, to eliminate duplicate exhibits;

(f) failed to prepare and file with the Court prior to December 11, 1978, a witness list as ordered by the Court;

(g) failed to inform the Court and opposing counsel by not later than December 11, 1978, of an intent to introduce testimony by way of deposition as ordered by the Court;

(h) generally, intentionally and deliberately ignored, without reason, every pretrial Order of the Court intended to facilitate an orderly and efficient trial.

2. Throughout the opening and closing arguments and interrogation of witnesses by opposing counsel, Schulman persisted in calculated efforts to distract the attention of the Court and the jury by:

(a) unnecessary and noisy activity at counsel table and roaming about the courtroom;

(b) standing at counsel table;

(c) shuffling papers, books, and documents;

(d) conferring with his clients in tones audible to the judge and jurors; and

(e) repeatedly ignoring the Court's requests and instructions to cease and desist in this misbehavior.

3. The respondent persisted in advancing comments, statements and arguments at side-bar conferences in audible tones calculated to reach the jury, accompanied by facial expressions and gestures intended to be observed by the jury, in disregard of the Court's requests, admonitions, and orders to refrain from such conduct.

4. The respondent persisted in directing leading questions to his own defense witnesses, indifferent to the requirements of the Federal Rules of Evidence and the repeated requests and instructions of the Court.

5. The respondent persisted in framing questions, both on direct and cross-examination, incorporating suggestions, innuendos, and/or insinuations accompanied by vocal inflections in a manner calculated to influence or prejudice the jury, ignoring the Court's numerous requests, admonitions and orders to cease and desist.

6. The respondent persisted in interrupting witnesses, thereby precluding them from completing answers, repudiating the Court's requests, admonitions and orders.

7. The respondent persisted in interrupting opposing counsel in his direct and cross-examination of witnesses by interposing objections before questions were completed, in disregard of the Court's requests, admonitions, and orders to Schulman to state his objections in the proper manner and at the appropriate time.

8. The respondent persisted in asking multiple questions in the form of a single interrogatory to the confusion of witnesses, rejecting the Court's requests, admonitions and orders to proceed in a proper manner.

9. The respondent persisted in pursuing repetitious avenues of inquiry, despite the Court's numerous instructions to refrain from such practice.

10. The respondent persisted in stating or alluding to matters obviously irrelevant to the cause, or matters which could not be supported by admissable evidence, in disregard of the Court's requests to comply with the Federal Rules of Evidence and the rules of the court.

11. The respondent persisted in pursuing avenues of inquiry having no basis in admissable evidence and designed solely to embarrass and demean witnesses and to influence and prejudice the jury.

12. The respondent demeaned and disparaged the plaintiff and her witnesses by incorporating into questions conclusory statements and suggestions of his personal opinion as to the justness of the cause, the credibility of witnesses, and the culpability of the plaintiff and her witnesses, and by conducting his interrogation in a loud and provocative manner accompanied by expression and gestures, ignoring the Court's repeated requests, admonitions, and orders to conduct courteous, proper and probative examination of witnesses.

13. The respondent persisted in attempting to engage in unnecessary dialogue with witnesses, opposing counsel, and the Court in the presence of the jury, in disregard of the Court's requests, admonitions and orders to cease and desist.

14. The respondent persisted in advancing provocative arguments following rulings by the Court upon objections, despite the Court's repeated instructions to cease and desist.

15. The respondent exhibited and admitted complete unpreparedness and disorganization, as well as unfamil-

iarity with identified exhibits and references thereto, resulting in inordinate delays in the trial and the necessity of conducting voir dire examination of several defense witnesses.

16. The respondent repeatedly advanced specious motions and arguments, unsupported by legal authority, and demanded that the Court respond thereto. For example, Schulman purported to reserve presentation of voir dire questions to the jury panel until the conclusion of all the evidence; he requested a directed verdict upon concluding direct examination of his first defense witness and prior to cross examination; he moved to instruct the jury that the standard of proof in 42 U.S.C. §1981 cases was proof beyond a reasonable doubt, rather than a preponderance of the evidence; and he steadfastly argued that equitable and declaratory relief, as distinguished from damages, could properly be awarded by a jury rather than the Court.

17. The respondent engaged in factitious outbursts in a loud and bellicose manner calculated to prejudice the jury, such as his irascible demands for a mistrial in the presence of the jury, and his agitated demand that the jurors be ordered from the courtroom so that he could present additional arguments and motions.

18. Schulman fell asleep during the lengthy voir dire examination of the plaintiff's deposition, prompted by his untimely demand to read the testimony to the jury.

19. The respondent intentionally misread and misquoted the deposition of a witness, David Gelzer, during Gelzer's voir dire examination, in an effort to embarrass the witness and mislead the Court.

20. Schulman's continuous provocative outbursts, and quarrelsome interruptions of witnesses, the Court, and opposing counsel necessitated repeated removal of the jurors from the courtroom in order to accommodate his agitated emotionalism and to avoid contamination of the jury.